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Supreme Court of the United States

October Term, 1974
No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

Brief of Amicus Curiae in Support of Respondent

EVELLE J. YOUNGER,
Attorney General,

JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,

WILLIAM E. JAMES,
Assistant Attorney General,

3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 620-2313,

Attorneys for Amicus Curiae State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Interest of Amicus Curiae 1

Summary of Argument 5

Argument 8

Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning Over 180 Years and Petitioner Has Presented No Constitutional Basis for His Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments 8

A. Introduction 8

B. The Constitution and the Decisions of This Court Set the Standard of Review on the Issue of Constitutionality of the Death Penalty 9

C. Capital Punishment Is Recognized in the Constitution as a Form of Punishment Available to the People 13

D. This Court Has Recognized the Constitutionality of Capital Punishment for Over 180 Years 15

E. Congress and the Legislatures of the Various States Can Reasonably Determine That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses 22

Page

F. Contemporary Society Recognizes Capital Punishment as a Permissible Form of Punishment in Its Arsenal to Combat Crime 36

Conclusion 41

INDEX TO APPENDICES

Appendix A. [Death Penalty] .....App. p. 1

Appendix B. Chapter 719. An Act to Amend Section 1018 of, to add Sections 190, 190.1, 190.2, 190.3, 209, 219, and 4500 to, and to Repeal Sections 190, 190.1, 209, 219, and 4500 of, the Penal Code, Relating to Punishment for Crimes 2

Appendix C. Statements of Arrestees Compiled by the Los Angeles Police Department's Study of the Deterrent Effect of the Death Penalty, February 1971 11

Appendix D. Examples of Deterrent Effect of Threat of Death Penalty Taken From Records of the Los Angeles Police Department and Reported in People v. Love, 56 Cal. 2d 720, 735-37 [336 P.2d 33, 41-42] (McComb, J., dissenting) 14

TABLE OF AUTHORITIES CITED

Cases Page

Aikens v. California, No. 68-5027, 403 U.S. 952, 91 S.Ct. 2280 .....2, 3

Aikens v. California, 406 U.S. 813 3

Anderson, In re, 69 Cal.3d 613, 447 P.2d 880 (1972) 3

Branch v. Texas, 403 U.S. 952, 91 S.Ct. 2287 ..2, 3

Fay v. Noia, 372 U.S. 391 30

Francis v. Resweber, 329 U.S. 459 17

Furman v. Georgia, 403 U.S. 952, 91 S.Ct. 2282 .....2, 3, 4, 6, 8, 9, 12, 15, 21, 24, 36, 38, 39

Furman v. Georgia, 408 U.S. 238 3

Goesaert v. Cleary, 335 U.S. 464 23

Jackson v. Georgia, 403 U.S. 952, 91 S.Ct. 2287 .....2, 3

Kemmler, In re, 136 U.S. 436 .....13, 16

McGautha v. California, 402 U.S. 183 ....11, 14, 23

McGowan v. Maryland, 366 U.S. 420 23

Newman v. United States, 382 F.2d 479 9

North Carolina v. Alford, 400 U.S. 25 30

Oyler v. Boles, 368 U.S. 448 9

Parker v. North Carolina, 397 U.S. 790 30

People v. Anderson (Crim. No. 13617), 6 Cal.3d 628, 498 P.2d 880 (1972) 2, 3

People v. Gilbert, 63 Cal.2d 690, 408 P.2d 365 28

People v. Love, 56 Cal.2d 720, 336 P.2d 33 34

People v. Peete, 28 Cal.2d 306, 169 P.2d 924 .. 28

People v. Purvis, 52 Cal.2d 871, 346 P.2d 22 28

Page

Powell v. Texas, 392 U.S. 514 .....20, 27
Robinson v. California, 370 U.S. 660 .....6, 10, 20
State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 .....9, 28
Trop v. Dulles, 356 U.S. 86 ....6, 10, 18, 19, 20, 21
United States v. Jackson, 390 U.S. 570 29
Weems v. United States, 217 U.S. 349 .....6, 10 .....16, 17, 19
Wilkerson v. Utah, 99 U.S. 130 16
Witherspoon v. Illinois, 391 U.S. 510 .....37, 39

Miscellaneous

Congressional Quarterly, Weekly Report, No. 30, p. 1983 38
Federal Bureau of Investigation, Uniform Crime Reports for the United States (1959) 32
Federal Bureau of Investigation, Uniform Crime Reports of 1973 (Sept. 6, 1974), pp. 6-7 27
Los Angeles Times (Nov. 16, 1966), Part I, p. 21 .. 32
Royal Commission on Capital Punishment, 1949-1953 Report, p. 340 40
Senate Bill 450 4
U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1968) 39
U.S. News and World Report (Jan. 20, 1975), p. 30 38

Rules

Rules of the United States Supreme Court, Rule 42(4) 1

Statutes

Page

Act of April 30, 1790, Ch. 9, Sec. 1, Stat. 112 .. 15
Act of April 30, 1790, Ch. 9, Sec. 3, 1 Stat. 112 .. 15
Act of April 30, 1790, Ch. 9, Sec. 8, 1 Stat. 112 .. 15
Act of April 30, 1790, Ch. 9, Sec. 14, 1 Stat. 112 .. 15
Act of April 30, 1790, Ch. 9, Sec. 33, 1 Stat. 112 .. 15
Act of April 2, 1792, Ch. 16, Sec. 19, 1 Stat. 246 .. 15
California Constitution, Art. I, Sec. 6 .....2, 4
California Constitution, Art. I, Sec. 8 4
California Constitution, Art. I, Sec. 13 4
California Constitution, Art. I, Sec. 27 3
California Constitution, Art. VI, Sec. 11 4
California Penal Code, Sec. 3046 28
Public Law 93-366 38
United States Constitution, Fifth Amendment .... 5 .....11, 14, 29
United States Constitution, Sixth Amendment 8, 29
United States Constitution, Eighth Amendment ....1, 2 .....3, 4, 5, 7, 8, 9, 10. 12, 14, 15, 16, 17 .....18, 19, 20, 21, 22, 35, 36, 40 41
United States Constitution, Tenth Amendment .. 13
United States Constitution, Fourteenth Amendment 1, 2, 3, 8, 10, 14, 18, 20

Textbooks

Ball, "The Deterrence Concept in Law and Criminology" (Jerome Hall, Criminology) 27, 28
Cohen, Morris R. "Moral Aspects of Criminal Law" 49 Yale L. J., pp. 987, 1011-12 25

Page

Denning, National Commission on Reform of Federal Criminal Laws, 2 Working Papers (1970), p. 1359 (n. 47) 24

Granucci, "Nor Cruel and Unusual Punishment Inflicted the Original Meaning" 7 Calif. L.Rev. p. 839 10

Packer, Comment, "Making the Punishment Fit the Crime" 77 Harv. L. Rev., pp. 1071, 1078 25

Patrick, "The Status of Capital Punishment: A World Perspective" (December 1965), 56 Jour. Crim. L. COPS, pp. 397, 411 40

Van Den Haag, "On Deterrence and the Death Penalty" 60 J. Crim. L. C. and P. S. (June, 1969), p. 141 33

Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia" 25 Stan. L. Rev., pp. 62, 76 .....22, 31

"You May Kill, But You Must Promise Not to Use Discretion: Furman v. Georgia" 6 Loyola L. Rev., p. 526 (1973) 22

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Interest of Amicus Curiae

The State of California files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of California have a vital interest in the question presented on the grant of certiorari in this case, that is, whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendments to the Constitution of the United States. (Petition for Certiorari, p. 2.)

For the reasons set forth below the State of California will be affected by the ultimate disposition of the question presented for review before this Honorable Court in the above entitled matter.

The attention of amicus will be directed to the fundamental issue: Is capital punishment cruel and unusual within the meaning of the Eighth and Fourteenth Amendments to the United States Constitution?

When this issue was last before this Honorable Court, the State of California was one of the parties appearing. *Aikens v. California,* No. 68-5027, reported in 403 U.S. 952, 91 S.Ct. 2280. The order granting certiorari in *Aikens* was made on June 28, 1971, and the question was stated, "does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." On the same date, similar orders were made in *Furman v. Georgia,* 403 U.S. 952, 91 S.Ct. 2282; *Jackson v. Georgia,* 403 U.S. 952, 91 S.Ct. 2287; and *Branch v. Texas,* 403 U.S. 952, 91 S.Ct. 2287. In the *Aikens* case, in contrast to the other three cases, at the guilt and penalty phases in the California court, three brutal murders were proved and, in the brief for the petitioner Aikens, it was conceded "we make no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted on this petitioner." Petitioner's Brief, *Aikens v. California,* p. 5.

Prior to the date set for argument before this Honorable Court, in the *Aikens* and related cases, the California Supreme Court set for argument the case of *People v. Anderson* (Crim. No. 13617), which was ultimately reported in 6 Cal.3d 628 [498 P.2d 880] (1972). In the *Anderson* case, the California Supreme Court, on February 18, 1972, held that capital punishment was unconstitutional under Article I, section 6 of the state constitution in that it came within the proscription of the cruel *or* unusual punishment clause thereof, finding that it was cruel and also unusual.[1]

Although the *Aikens* matter was argued on January 17, 1972, along with *Furman, Jackson* and *Branch, supra,* when the *Anderson* case was decided on February 18, 1972, the suggestion was made to this Honorable Court that the *Anderson* decision mooted the issue involved in *Aikens* and that as a consequence the petition should be dismissed. Accordingly, on June 7, 1972, this Honorable Court in *Aikens v. California,* 406 U.S. 813, 814, determined, on the Suggestion of Mootness and Motion for Remand, the decision of the state court having rested on an adequate state ground and the holding having been determined by the California court to be fully retroactive and applying to any prisoner in the State of California under sentence of death, that the petitioner Aikens no longer faced a realistic threat of execution and that the issue upon which certiorari was granted was now moot. Accordingly, the writ of certiorari was dismissed.

On June 29, 1972, this Honorable Court rendered the decision in *Furman v. Georgia* reported in 408 U.S. 238, holding that in *those* cases (*Furman, Jackson* and *Branch*) the imposition and carrying out of the death sentence was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Thereafter, through exercise by the People of the initiative, the Constitution of the State of California was amended, effective on November 7, 1972, providing as set forth in Article I, section 27, that the death penalty provided in the State statutes should not be

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[1]*Cf., In re Anderson,* 69 Cal.2d 613, 629-32 [447 P.2d 880] (1972).

deemed to be infliction of cruel or unusual punishments within the meaning of Article I, section 6, or any other provision of the state constitution. The amendment to the state constitution is attached to this brief and marked Appendix A.

Following the amendment of the state constitution and the ruling of this Honorable Court in *Furman v. Georgia, supra,* the Legislature of the State of California, by Senate Bill 450, which subsequently became Chapter 719 of the Statutes of 1973, enacted statutory provisions to reinstate the death penalty in certain circumstances. Chapter 719 became effective January 1, 1974, and is attached to this brief and marked Appendix B.

It is evident that the People, by the exercise of the initiative, indicated what had previously been clear in the state constitution[2] that capital punishment was not to be prohibited as an available punishment for serious crimes and that abolition should be effected by the constitutional mode thereof by the vote of the representatives of the People through their Legislature and not locked into the constitution forever by judicial edict.

Amicus contends that the prohibition of the Eighth Amendment to the Federal Constitution against cruel and unusual punishment should not be construed as a bar to the states or to the Congress to provide as a punishment for serious crimes the death penalty and that the imposition of such punishment for such serious crimes is not prohibited by the Federal Constitution.

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[2]Article I, sections 6, 8 and 13 as the article then read. Article VI, section 11 gives the State Supreme Court direct appellate jurisdiction in *capital* cases.

Amicus is concerned that petitioner herein seeks to importune this Honorable Court to "lock into" the United States Constitution the abolition of capital punishment and to place beyond the power of Congress and the People, through the legislatures of the several states, the right to determine that the protection of society from serious crimes requires the availability of this sanction, a dilemma which only recently confronted the People of the State of California.

The State of California has been authorized by the Attorney General of Oklahoma, the Honorable Larry Derryberry, to inform the Court that the State of Oklahoma joins in this amicus brief and in urging that the provisions of the United States Constitution do not prohibit capital punishment as a penal sanction for serious crimes.

The State of California is also authorized to state that the State of Texas, by the Honorable John L. Hill, Attorney General, supports amicus in its basic position that it is constitutionally permissible for state legislatures to provide for the death penalty for certain crimes.

Summary of Argument

Capital punishment has been recognized as a permissible punishment for serious crimes since the establishment of our nation. It was expressly referred to in the Fifth Amendment, adopted at the same time as the Eighth. The wisdom and social desirability of this penal sanction are matters addressed to the legislative branch of government.

This Court has not declared the death penalty to be unconstitutional *per se* and in decisions in which other forms of punishment were held cruel and unusual,

i.e., Weems v. United States, 217 U.S. 349; *Trop v. Dulles,* 356 U.S. 86, and *Robinson v. California,* 370 U.S. 660, it was assumed or expressly stated that the death penalty did not violate the Constitution. *Furman v. Georgia, supra,* did not reverse this line of authority.

The intent of the Framers was to bar only those punishments both cruel and unusual either in their inherent form or as grossly excessive in their application in relation to the seriousness of the particular crime.

The arguments of petitioner that capital punishment serves no social purpose and his claim that there are alternative penal sanctions should be directed to Congress and the legislatures of the several states and do not raise a constitutional question. No burden is placed on the People or the states to present conclusive proof of the utility of this form of punishment and any burden, if one exists, is only to demonstrate that there is in fact a basis upon which Congress and the state legislatures could reasonably conclude that certain serious offenses should be punished by death.

The studies upon which petitioner relies for his conclusion that capital punishment serves no penal purpose have obvious flaws and there are numerous graphic illustrations of the deterrent effect of this sanction as well as proof of the inadequacy of incapacitation by life imprisonment as a protection for society. The deterrent force of the threat of the death penalty has been recognized by this Court and those who come into direct contact with the criminal offender.

It must be concluded that petitioner has failed to make a case for his contention that no legitimate social aim can be furthered by the availability of this form of punishment.

Petitioner's claim that this form of punishment has been rejected by society is refuted by the evidence he presents. The claim is also refuted by the response at the ballot box and in the legislative halls of a majority of the states. The recent enactments by Congress and the majority of the states of legislation providing for capital punishment is indicative of the continuing recognition of the need for this penalty as a protection for society.

Amicus submits that nothing has happened in the 185-year history of the Constitution which requires this Court to now declare the punishment, expressly recognized in our Constitution and upheld by a line of decisions spanning a good part of our nation's existence, to be in violation of the Eighth Amendment.

It must be concluded that this accepted form of punishment is not "cruel and unusual" in violation of the Eighth Amendment.

ARGUMENT

Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning Over 180 Years and Petitioner Has Presented No Constitutional Basis for His Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

A. Introduction

Amicus will direct the argument to the contention that the infliction of the punishment of death is excessive (Br. for Pet., pp. 102-40), and in violation of the prohibition of cruel and unusual punishments contained in the Eighth Amendment to the United States Constitution.

If the questions relating to the North Carolina procedure as to the charging function of the prosecutor (Br. for Pet., pp. 45-53), the disposition of cases before trial (Br. for Pet., pp. 53-61), the fact finding function of the jury under the guarantee of the Sixth Amendment (Br. for Pet., pp. 62-95), and the exercise of the clemency function of the executive (Br. for Pet., pp. 95-101) are before the Court on the grant of certiorari in this case, amicus will leave these matters to the respondent for reply.

It is submitted that *Furman* struck down the imposition and carrying out of discretionary death sentences and that it did not discuss other functions of the criminal justice system (referred to by petitioner as "these mechanisms" (Br. for Pet., p. 102)). The prosecutor is a public officer charged with duties and obligations as a member of a coordinate branch of government.

He can take into account special facts and circumstances of the particular case not taken into account by rigid rules. Traditionally this function has not been disturbed except where the exercise thereof has been based on a suspect or unjustifiable standard, such as race, religion, or other arbitrary classifications. *See Oyler v. Boles*, 368 U.S. 448; *Newman v. United States*, 382 F.2d 479, 480. This rule would also be applicable to pleas and other dispositions in the individual cases. *Furman* likewise was not directed at the fact finding function of juries and this was not the "discretion" of which the Court spoke; nor was the clemency power of the executive impugned.

Petitioner has not shown any reason why these vital functions in the system of justice, and to which *Furman* was not directed, should be treated differently when a death penalty is possible. It is submitted that in arguing such a departure from customary procedure in the federal and state systems of criminal justice petitioner reads too much into *Furman*. *See State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 741-43.

B. The Constitution and the Decisions of This Court Set the Standard of Review on the Issue of Constitutionality of the Death Penalty

Under the caption "The Standard of Judicial Review" petitioner (pp. 103-21) attempts to have this Honorable Court ignore the clear mandate in the Constitution, the amendments thereto and the decisions of this Court in numerous cases throughout our history and to hold that now, because of some magic talisman called "evolving standards", the death penalty is forbidden to Congress and the various states by the Eighth Amendment.

It is the contention of amicus that the United States Constitution does not forbid the Congress and the various states from providing such a sanction in performing the function of affording protection to the law abiding citizens.

It is, of course, a tempting invitation to enact one's personal predelictions into the constitution. It is acknowledged that this puts judicial restraint to a severe test.

The petitioner speaks as though the recognition of the retention of the power of the People to abolish or retain capital punishment relegates the power in the court under the Eighth Amendment to "mere advice." His complaint is that to acknowledge that the court lacks power to legislate the abolition of capital punishment makes the Eighth Amendment a nullity. This argument is made without regard for the proper exercise of that power by this Court in reversing convictions in *Weems, supra; Trop, supra;* and *Robinson v. California, supra*. In *Weems*, the reversal of the judgment was on the basis of cruelty inherent in the punishment. In *Trop* and *Robinson*, it was the disproportionate penalties involved that required the reversal.

See Granucci, "Nor Cruel and Unusual Punishment Inflicted the Original Meaning" 7 Calif. L.Rev. 839.

The Court has not considered itself foreclosed from considering whether in a particular case the Eighth and Fourteenth Amendments have been offended. However, the Court has not considered itself free to read into a portion of the constitution a meaning that is plainly at variance with its language.

Amicus contends that the Constitution does not permit "evolving standards" to be the basis for taking

away those rights retained by the states and the People and expressly permitted forms of punishment contemplated as constitutional, without complying with the provisions of that document for the orderly and lawful amendment thereof. U.S. Const. Art. V.

In response to the argument that the scope of judicial review must include the power to declare the abolition of capital punishment, amicus contends that the clear intent of the Framers of the Constitution and its amendments was to bar only those punishments which are both cruel and unusual either in their inherent form or grossly excessive in their application in relation to the seriousness of a particular criminal act.

It cannot be said that a constitutional issue is presented to this Court by petitioner's claim that alternative remedies are available to the states and Congress. Most of petitoner's arguments should properly be directed to Congress and to the various state legislatures. Petitioner has a burden, that he has not met, to demonstrate that the legislative bodies charged with the difficult task of fashioning punishment for serious crimes could not determine that capital punishment is a necessary weapon in the arsenal of society to combat serious and violent crime.

As Mr. Justice Harlan stated in *McGautha v. California*, 402 U.S. 183, 195-96, the court's "function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures . . . in such cases." The question for decision is not whether the Court approves the procedures followed, the question is whether those procedures fall below the minimum level the Constitution would tolerate.

The judgment as to the feasibility of capital punishment is one that the Constitution delegates to the Legislature. The Eighth Amendment has not in the past, nor does it now, forbid to the Congress or the legislatures of the several states the power to determine that capital punishment can serve a proper penal purpose in the structure and framework of the criminal justice system.

Chief Justice Burger, dissenting in *Furman, supra* at 384, set the proper standard for judicial review of this matter,

> "I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in society. This presumption can only be negated by unambiguous and compelling evidence of legislative default."

Such evidence has not been forthcoming!

There is no issue before this Court of the wisdom or social desirability of capital punishment. These are questions addressed wholly to legislators. Even those who are personally opposed to capital punishment may well conclude that it violates no provision of the Constitution. The petitioner strives to wrest from the Constitution the power in the court to now declare that what was accepted as a mode of punishment for crime from the time of the inception of the nation is no longer to be tolerated by the Constitution. This is a task

of some magnitude in light of the authorities which will be reviewed.

C. Capital Punishment Is Recognized in the Constitution as a Form of Punishment Available to the People

The history of capital punishment in this country and the deep rooted origins of that form of punishment in the religious and moral heritage of contemporary America provide clear indications that the death penalty is no barbaric relic of the past.

Execution as a form of punishment is expressly recognized by provisions of the United States Constitution. The Constitution as originally written, contained indirect allusions to capital punishment. Among the Constitution's objectives as set forth in the preamble were to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Further evidence of the Framers' intentions is contained in Article II, section 2, giving the President power to grant reprieves (withdrawal of sentence of death) and Article III, section 3, providing that Congress shall have power to declare the punishment for treason, the common punishment then, and now in jurisdictions retaining capital punishment, being death. The specifications of these objectives suggest that the Framers intended the new federal government to have the inherent power of all governments to decree whatever customary punishments for criminal conduct were deemed necessary to protect the lives, liberties and properties of its citizens. *See In re Kemmler*, 136 U.S. 436 at 449. Absent particular prohibitions written into the Constitution, this was to be the rule. Similarly, three years later, the Tenth Amendment recognized that pow-

ers not prohibited to the states or delegated to the federal government were reserved to the respective states or to the People.

The history of the phrase "cruel and unusual punishment" and its inclusion in the first ten amendments to the United States Constitution has been treated at length in recent opinions of this Honorable Court and in some exhaustive commentaries by scholars. One fact stands out clear and was well stated by Mr. Justice Black, concurring in *McGautha v. California, supra,* 402 U.S. 183 at 226, the Eighth Amendment's "words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment."

The first ten Amendments to the Constitution were proposed by the First Congress and in turn ratified by the States in 1791. Among these, the Fifth Amendment expressly recognized what had been implied in the provisions of the original Constitution, that death was among the forms of punishment for criminal conduct available to the federal government. The Fifth Amendment contains a mandate that "No person shall be held to answer for a *capital,* or otherwise infamous crime, unless on a presentment or indictment of the grand jury." The amendment further commands that no person "be twice put in jeopardy of *life*", nor deprived of *life,* liberty, or property, without due process of law. This language was included and made applicable to the states in 1868 by the Fourteenth Amendment.

The following chronology further refutes the contention that those who enacted the Eighth Amendment

intended thereby to abolish capital punishment. The amendment passed the First Congress on September 25, 1789. That same Congress, a mere seven months later enacted "An Act for the Punishment of Certain Crimes Against the United States", which statute made the following offenses punishable by death by hanging: treason, murder within federal territory, piracy, and counterfeiting of public securities. *See* Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33, 1 Stat. 112. The Eighth Amendment was ratified by the states on December 15, 1791, and less than four months later on April 2, 1792, the Second Congress made it a capital offense to debase coins of the United States Mint. Act of April 2, 1792, ch. 16, § 19, 1 Stat. 246.

As will be developed hereafter, the interpretation of the clause by this Court[3] confirms the conclusion that capital punishment was not prohibited to the federal government or the states by the Eighth Amendment.

D. This Court Has Recognized the Constitutionality of Capital Punishment for Over 180 Years

The subsequent history of the Eighth Amendment as it has been interpreted by this Court in 184 years of its existence likewise lends no support to the claim of petitioner that the death penalty is unconstitutional when carried out without unnecessary cruelty as punishment for a serious offense such as murder.

The first occasion this Honorable Court had to consider at any length the constitutional prohibition against cruel and unusual punishment was in 1878 in the

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[3]When *Furman* was before this Court, the constitutions of 48 states contained some provision against excessive punishment but, with the California experience excepted, no state court had interpreted these provisions as abolishing capital punishment.

case of *Wilkerson v. Utah*, 99 U.S. 130. In that case the Court upheld the mode of execution, shooting, as not forbidden by the Constitution's prohibition against cruel and unusual punishment. This Court noted the difficulty in defining "the extent of the constitutional provision" but the applicability of the provision to punishments of torture and all others involving unnecessary cruelty.

In 1890, the Court denied an application for writ of habeas corpus sought on an allegation that death by electrocution constituted a cruel and unusual punishment. *In re Kemmler*, 136 U.S. 436. This Honorable Court denied the application on the grounds that the Eighth Amendment did not apply to state legislation, but added the comment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, *something more than the mere extinguishment of life*." (Emphasis added.)

In *Weems v. United States, supra*, 217 U.S. 349, this Honorable Court in 1910, for the first time, overturned a punishment as cruel and unusual. In that case the defendant, on conviction of falsifying an official document, had been sentenced to 15 years of hard labor to be served in wrist and ankle chains with attendant life-long disabilities and a severe fine. The case arose under the Philippine Bill of Rights, whose prohibition against "infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning." (*Id.* at p. 367).

This Court was not troubled by the circumstance that the punishment was somewhat novel in the context of the type of punishment to which the cruel and unusual clause was thought to apply noting that the clause, like all principles "to be vital must be capable of wider application than the mischief which gave it birth." Quoting from Cooley's Constitution Limitations, the Court stated that it was probable that "any punishment declared by statute for an offense which was punishable the same way at common law could not be regarded as cruel or unusual, in a constitutional sense."

In setting aside the punishment, this Court in *Weems* noted that "there are degrees of homicide that are not punished so severely" and that the statute in question had no parallel in American legislation and came from a government of different origins. The Court found the statute "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind." (*Id.* at p. 377).

In 1947, the case of *Francis v. Resweber*, 329 U.S. 459, was considered by the Court. In this case the issue was whether a pending second electrocution of a condemned murderer following an unsuccessful first attempt at execution constituted cruel and unusual punishment. The Court rejected the claim of unconstitutional punishment. In an opinion joined by three other members of the Court, Mr. Justice Reed, in announcing the judgment of the Court, discussed the issue under the assumption, but not so deciding, that a violation of the Eighth Amendment would be violative of the

Fourteenth Amendment's due process clause. The opinion concluded:

> "We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.
>
> ". . . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, *not the necessary suffering involved in any method employed to extinguish life humanly.*" (*Id.* at pp. 463-64; emphasis added).

The next occasion on which this Court examined the scope of the Eighth Amendment's prohibition against cruel and unusual punishment was in 1958 in the case of *Trop v. Dulles, supra,* 356 U.S. 86, in which Chief Justice Warren, joined by three other members of the Court, concluded that denationalization of a native-born citizen for less than one day's desertion from military duty constituted unconstitutional punishment. Justice Brennan found the enactment of such punishment beyond the power of Congress to legislate. Four justices rejected both theories and would have upheld the statute upon which the denationalization was premised.

Chief Justice Warren's opinion noted that initially, "since wartime desertion is punishable by death, there

can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." While recognizing the phrase cruel and unusual punishment was not precise, the opinion clarified the scope of the constitutional prohibition against such punishment by stating, "Fines, imprisonment and *even execution* may be imposed depending upon the enormity of the crime but any technique outside the bounds of these traditional penalties is constitutionally suspect." (Emphasis added). Thus the penalty in *Weems* was characterized as meeting the two-prong test of being cruel in its excessiveness and unusual in its character, as was the penalty in the case then before the Court. Stating that the Eighth Amendment must "draw its meaning from its evolving standards of decency that mark the progress of a maturing society", Chief Justice Warren concluded that denationalization under the circumstances before the Court constituted "a form of punishment more primitive than torture." Significantly, Chief Justice Warren stated:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be on capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concepts of cruelty." *Trop v. Dulles, supra* at 99.

Thus the opinion of the Court, while recognizing the forceful legislative arguments against the death penalty, rejected the constitutional argument against that form of punishment.

Any doubt whether the Eighth Amendment's ban on cruel and unusual punishment applied to the states through the operation of the Fourteenth Amendment was dispelled in 1962 by the decision of this Court in *Robinson v. California*, 370 U.S. 660, which invalidated punishment of imprisonment imposed on the defendant by reason of his being found addicted to narcotics. In this case the Court's opinion focused not on the nature of the punishment, which was only 90 days in county jail, but on its inappropriateness as applied to a status, that of being a narcotic addict.

In 1968, this Honorable Court refused to extend its ruling in *Robinson* to the punishment, by a fine of $50, of a defendant convicted of the crime of being intoxicated in a public place, *Powell v. Texas*, 392 U.S. 514. In this case the plurality opinion of the Court distinguished the punishment of status involved in *Robinson* from the punishment of the uncompelled act before the Court in *Powell*.

If the decisions of this Court applying the cruel and unusual punishment clause are susceptible of synthesization into a consistent body of principles, the cases appear to stand for the following propositions, punishment will be held unconstitutional if it is both cruel and unusual either as (1) a punishment inherently cruel and inherently unusual in its form or (2) a punishment not inherently cruel and unusual but grossly excessive as applied (a) in relation to the seriousness of the particular criminal act or (b) to any status which does not involve an uncompelled act.

Seizing upon some of the language of the plurality opinion in *Trop v. Dulles, supra*, 356 U.S. 86, as proof that that decision signaled the end of the right of both the Congress and the legislatures of the various states

to prescribe death as a punishment for first degree murder, the petitioner ignores the fact that the opinion in question went out of its way to recognize the Constitutional validity of the death penalty. The words that the petitioner uses are "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 101. To be fair to petitioner, his fixation with this phrase is understandable in view of the fact that it provides the only arguable escape from the historical reality of capital punishment's recognition as a legitimate penalty, outside the scope of cruel and unusual punishments, in the wording of the Constitution and in the law that preceded and followed adoption of that document and the Bill of Rights.

In petitioner's attempt to avoid the impact of this history, he has failed to demonstrate that anything has transpired in the last 17 years since 1958 that has impugned the validity of the observation made by Chief Justice Warren that the death penalty "in a day when it is still widely accepted cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles, supra*, 356 U.S. 86 at 99.

Amicus contends that *Furman* did not overrule the cases discussed hereinabove or impugn their validity as proper interpretations of the Eighth Amendment to our Constitution. Further, that the short time since *Trop* was decided has not seen any retreat from the wide acceptance of capital punishment recognized as foreclosing any constitutional rejection of capital punishment.

Amicus adopts the analysis of the Chief Justice in his dissenting opinion in *Furman v. Georgia, supra*, at 375-76, 396-403, that the Court did not rule capital

punishment *per se* violative of the Eighth Amendment, but that the judgments in the cases before the Court were to be set aside because of discretionary sentencing practices; that the Eighth Amendment could not be construed to be a bar to the imposition of the sentence of death but that juries and judges were not to be permitted to make the sentencing determination in the same manner as they had in the past.

See also Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia" 25 Stan. L. Rev. 62; "You May Kill, But You Must Promise Not to Use Discretion: Furman v. Georgia" 6 Loyola L. Rev. 526 (1973).

E. Congress and the Legislatures of the Various States Can Reasonably Determine That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses

The amicus contends that the death penalty does serve a vital purpose in the punishment structure of society and that this is a matter upon which the legislatures of the various states and the Congress may make a determination.

Amicus does not concede that it has the burden of proving that the death penalty is a superior deterrent by making this argument, nor that capital punishment must be established as a more effective punishment for crime in order that this penalty be constitutionally acceptable. It was not the intention of the Framers of the Constitution to require such a showing by Congress or the states.

The showing as to the social utility of capital punishment should be addressed to the legislative body and the burden, if any, which must be assumed in the judi-

cial setting, is only to demonstrate that there is, in fact, a basis upon which the legislatures of the various states and Congress could reasonably conclude that certain serious offenses should be punished by death.

It is a settled doctrine of constitutional law that the burden of proof is on the one who challenges the constitutionality of a statute and that in the absence of a clear showing of unconstitutionality a state statute will be presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425-26.

Many of the arguments made by the petitioner are moral, humanitarian, and pragmatic arguments against capital punishment which might well prove persuasive to the Legislature in considering a change in the law or to a governor asked to commute a sentence of a condemned person, but, in this Court, the argument must stand or fall on its own since this Court is limited to the issue of constitutionality and it cannot write into the law its notion of morality or humanitarianism or its pragmatic preferences.

As a purely constitutional matter, the analysis made by petitioner gives too little weight to the elements of retribution and deterrence and gives too much weight to "advance concepts of behavioral science." It is submitted that the constitution does not require legislatures to reflect sociological insight or shifting social standards any more than it requires them to keep abreast of the latest scientific standards.

See Goesaert v. Cleary, 335 U.S. 464, 466; *see also, McGautha v. California, supra,* 402 U.S. 183, 221.

The basic elements commonly ascribed as the purposes of punishment may be reduced to four: (1) deterrence; (2) incapacitation or isolation; (3) rehabilitation; and (4) retribution. As to rehabilitation, it is ob-

vious that as to the serious criminal offender deemed not to be capable of rehabilitation and sentenced to death, this purpose of punishment is not effective. As to retribution, while it may not now be recognized as a major objective in our system of punishment, as Lord Justice Denning said,

> "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty." Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 (n. 47) (1970).

And as Mr. Justice Stewart said in his concurring opinion in *Furman v. Georgia, supra,* at 308,

> "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice and lynch law."

One commentator (Morris R. Cohen, "Moral Aspects of Criminal Law" 49 Yale L. J. 987 at 1011-12), in discussing the retributive theory of punishment said that those who ignore this facet of punishment are only evidencing sentimental foolishness, that if the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law there is danger of reversion to the bloody vengeance of the feud and vendetta.

See also: Packer, Comment, "Making the Punishment Fit the Crime" 77 Harv. L. Rev. 1071, 1078.

What, then, of deterrence? Has the petitioner conclusively established that the death penalty deters no significantly greater number of persons from committing murder than does the prospect of life imprisonment?

The studies upon which petitioner relies conclude that the death penalty exerts no discernible influence on the rate of homicides. The truism that one may prove almost anything with statistics is a circumstance that makes one particularly concerned, in a matter as fraught with strong feelings as the desirability of the death penalty, that the statistician be totally objective and free of bias.

It may be accepted that the statistical studies do not prove or disprove the deterrent effect of capital punishment. However, it is also true that these statistical findings do not focus on the various differential factors that are operative in the various jurisdictions which they attempt to pronounce. Social and economic conditions such as population pressure, unemployment rate, influx of racial and ethnic minorities, in addition to such factors as the efficacy of local law enforcement, climate and weather, and the number of attractive

crime targets, all play a significant role in determining the number of homicides, particularly robbery homicides, committed in a certain jurisdiction in a given period of time. The existence of so many influential factors not susceptible of measurement and correlation would impugn the statistical methodology on which petitioner places so much reliance. Clearly the existence of these variables precludes a meaningful comparison between general undifferentiated murder statistics and a single proposed casual factor—that of the existence of the death penalty in a particular jurisdiction.

Secondly, the steady increase of homicides across the nation, presumably caused by social and economic factors, naturally tends to cover up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of the social laboratory.

A third objection to the statistical approach is that it measures the homicide rate in terms of the theoretical existence of the death penalty, that is, the existing statutes and judgments imposing the punishment of death, rather than in terms of the actual existence of the death penalty, that is, executions carried out. During the previous decade in which the dramatic increases in murders were recorded, while juries continued at a relatively stable rate to fix the penalty of death in the appropriate cases, the annual number of executions in the United States dwindled to nothing. In this context, amicus concurs with petitioner's apparent view that the death penalty would be an even greater deterrent were it not for the inordinate delay existing in the courts today which precludes the application of swift punishment to the offender. Interestingly enough, the homicide rate in California was relatively stable in the decade from 1953 to 1963. In 1963, the year of the last execution, except for the one in April of 1967, the rate was 3.8 per hundred thousand population. The rate climbed to 6.0 in 1968 and 6.9 in 1969. The current statistics are even higher (8.7 in 1972) and it is to be noted that nationwide, the murder increase has been marked since the judicially created moratorium on the death penalty in 1967. The period from 1968 through 1973 showed that the number of offenses of murder increased 42% and that the rate per hundred thousand inhabitants was up 35%.

Federal Bureau of Investigation, Uniform Crime Reports, 1973 (September 6, 1974) at pages 6-7.

As Justice Marshall observed in *Powell v. Texas, supra*, 392 U.S. 514 at 531, with general reference to the deterrent effect of criminal sanctions,

> ". . . . The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."

Amicus submits that the foregoing statement has equal validity when applied specifically to the deterrent effect of the death penalty. It would appear to be a fact that to the rational person the threat of the greater punishment has a greater deterrent effect.

On deterrence, Professor Ball in his article, "The Deterrence Concept in Law and Criminology" notes that the statistical data pertaining to the effectiveness of capital punishment as a deterrent measure is generally

inconclusive. He notes that Jerome Hall has criticized the scientific pretentions of modern, positivistic criminology and has said that the so-called new penology is based upon implicit and unsupported dogmas (Jerome Hall, Criminology).

Deterrence is not the only function of punishment served better in many instances by the existence of the death penalty than by a maximum available punishment of life imprisonment. Despite petitioner's insistence to the contrary, life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the offender. In California, life imprisonment means the prisoner is eligible for parole after serving seven years of his term. Cal. Pen. Code § 3046. The myth that paroled murderers do not kill again evaporates upon a perusal of the case reports. In California this is evidenced by, among other cases, *People v. Peete*, 28 Cal.2d 306, 308-09 [169 P.2d 924, 926]; *People v. Purvis*, 52 Cal. 2d 871, 875 [346 P.2d 22, 24]; *People v. Gilbert*, 63 Cal.2d 690, 702 [408 P.2d 365, 372].

It is also to be noted that before this Court on a petition for certiorari is another case from North Carolina, *State v. Jarrette*, October term, 1973, No. 73-6877. In this case a convicted murderer escaped and in the process of escaping, raped a black girl and stabbed to death a white youth. *See State v. Jarrette, supra*, 202 S.E.2d 721. Certainly these are a few of what are many, many examples of the inadequacy of life imprisonment to protect society from such aggressive behavior. Congress and the legislative bodies of the various states are in the best position to determine the effectiveness of a form of punishment and to conclude

that for certain crimes the death penalty is the most effective method of protecting society.

It must be noted that the armed robber or armed burglar commonly faced with a maximum term of life imprisonment if apprehended might well consider himself foolish not to kill his victims or other witnesses if by doing so he would risk only the same penalty—life imprisonment for murder—while increasing multifold his chances of avoiding apprehension. The armed robber of a one-man liquor store operation would not let petitioner's views of the dignity of human life cause him to hesitate for a moment at killing a lonely figure behind the counter at a late hour when no other persons are around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer in order to avoid apprehension and conviction, when without the death penalty the criminal will risk no added punishment if he does away with his intended captor. This is also true of the "lifer" in a correctional facility who is faced with another life sentence for taking the life of a guard or inmate in prison. Such a sentence would not only be futile but would make a mockery of our system of justice.

We must note the judicial recognition of the deterrent effect of capital punishment which is contained in the reports of this Honorable Court. This Court noted the deterrent effect of capital punishment in *United States v. Jackson*, 390 U.S. 570 at 581, when it was said that the inevitable result of a statute providing for waiver of a jury trial to avoid possibility of a death penalty discouraged the assertion of the Fifth Amendment right to plead not guilty and that it acted to deter the exercise of the Sixth Amendment right to demand a jury trial, that such a provision "chills" the assertion

of these rights by penalizing those who choose to exercise them. It has been recognized that the death penalty is the most severe and awesome penalty known to our law and that the threat of the death penalty has been identified as a factor to be given considerable weight in determining whether a defendant has deliberately waived constitutional rights. *See Parker v. North Carolina,* 397 U.S. 790 at 809-10 (Brennan, J., dissenting).

In *Fay v. Noia,* 372 U.S. 391, 397, 439-40, Noia's attorney testified at the habeas corpus hearing that defendant Noia was motivated not to appeal his case by fear that if successful he might get the death penalty on a retrial. Had he appealed, he would have run a substantial risk of electrocution and, as this Court said, "his was a grisley choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which if successful might well have led to a retrial and the death sentence."

In another case, *North Carolina v. Alford,* 400 U.S. 25 at 40, in the dissenting opinion by Mr. Justice Brennan it was said that "it is sufficient to state that Alford *was 'so gripped by fear of the death penalty'* that his decision to plead guilty was not voluntary but was the product of duress as much so as the choice reflecting physical constraint." (Emphasis added).

It is submitted that state legislatures, as well as the Congress, can also conclude that the existence of the death penalty for certain heinous crimes might cause some potential murderers to be "so gripped by fear" that they would be deterred from criminal endeavors and would refrain from the firing of a gun at the lonely clerk standing in a liquor store or the police officer

attempting to effect an arrest. As the Joint Report of the Legislative Committee on Capital Punishment of Pennsylvania said, "The plain fact is that it can never be known how many persons are actually deterred by threat of punishment whether capital or otherwise." It is also said that if capital punishment is so unique, so abhorrent and so fearsome it seems inconceivable that a rational person trying to decide whether to commit a capital crime would ignore the potential penalty of death.

See Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia" 25 Stan. L. Rev. 62 at 76.

It must be recognized that the innocent life saved when the potential murderer is "so gripped by fear" of the death penalty as to hold his fire and refrain from taking someone's life is not reflected in the statistics surveyed by the social scientists.

Petitioner, an undeterred murderer, assures us that the death penalty does not deter. The fact that it does not deter *all* is no reason for rejecting this form of punishment (particularly by constitutional mandate). The statistics to which he refers lump the undeterrable murders with those that could possibly be deterred. Studies of murder rates and their relationship to the death penalty would be valid only if they were limited to deterrable homicides involving a course of criminal conduct understandingly embarked upon, such as armed robbery, collection of insurance on the victim's life, kidnapping for ransom, etc.

At this point it may be well to refer to some information collected by those who have first-hand information concerning the deterrent effect of capital punishment, namely, those who deal with homicidal offenders.

Sheriff Peter Pitchess of Los Angeles County, testified before the California Senate Committee on the Judiciary (1960) as follows:

> "But I can tell you that the overwhelming majority of people in law enforcement—the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior—are overwhelmingly convinced that capital punishment is a deterrent."

Likewise the late J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated his unqualified opposition to the abolition of capital punishment in an issue of the Uniform Crime Reports for the United States (1959 issue):

> "The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty. . . . For the law enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessity ingredient."[4]

There have been many surveys conducted to test the deterrent effect of the threat of the death penalty. One is the study by the Los Angeles Police Department on Capital Punishment concluded in February, 1971. This survey confirmed the validity of the conclusion

[4]It may be noted that the Los Angeles Times (Nov. 16, 1966, Part I, p. 21) reported that "The Prison Officers Assn. of Great Britain has demanded the return of the death penalty, stating that since abolition of capital punishment . . . 'There is nothing to deter the growing number of long-term criminals from killing prison officers in an attempt to escape.' "

drawn by innumerable legislatures that the threat of the death penalty is a deterrent to murder and the incidents documented in the surveys are from contacts with criminals which are real and direct rather than merely academic. We, of course, do not imply that all those whose experience with the criminal world is purely academic conclude otherwise. One example is Van Den Haag, "On Deterrence and the Death Penalty" 60 J. Crim. L. C. and P. S. 141 (June, 1969).

The Los Angeles Police Department survey, embodied in a 62-page report, was conducted between December 21, 1970, and February 4, 1971, and involved the interviewing of 316 arrestees. Unarmed suspects were asked why they did not arm themselves, and armed suspects who did not use their weapons were asked why they did not. Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case. The positive statements made by the remaining 99 are classified as follows:

1.	Deterred by fear of death penalty from carrying weapon or operative weapon	50 (50.5%)
2.	Unaffected by death penalty because it was no longer being enforced	7 (7.07%)
3.	Undeterred by death penalty, would kill whether it was was enforced or not	10 (10.1%)
4.	Unaffected by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else	32 (32.3%)

The conclusions drawn from the study are as follows:

> "I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides.
>
> "II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced.
>
> "III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty would deter them from being armed while committing crimes."

The report also notes, "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right of due process of law."

On the basis of objective criteria, the report compiled and selected 25 case histories from the 99 individuals who made positive statements. Of the 25 arrestees, 16 were under arrest for robbery, 4 for burglary, 3 for felonious assault, and 2 for rape; and 10 were armed when arrested while 15 were not. The 25 statements are set forth in Appendix C.

An earlier survey by the Los Angeles Police Department is reported in *People v. Love*, 56 Cal.2d 720, 735-37 [336 P.2d 33, 41-42] (McComb, J. dissenting). The examples presented are contained in Appendix D.

It would appear that what this court has previously noted is ably supported by the foregoing, that is, that certain potential murderers are "so gripped by fear of the death penalty" that they refrain from taking life endangering action when in pursuit of their criminal enterprises, or, better yet, they do not engage in such enterprises at all.

Petitioner refers to these surveys and the statements of the law enforcement officers as "impressionistic accounts" (Br. for Pet., p. 128 n. 207) or as "anecedotal impressions" of law enforcement officers (Br. for Pet., Appendix E, p. 1e). It is clear that Congress and the legislatures of the various states have not treated so cavalierly these surveys and the testimony of those who come into daily contact with the criminal.

Likewise, in petitioner's Appendix E, petitioner has listed some of his conclusions regarding the utility of capital punishment, with particular reference to its deterrent effect. Amicus contends that the Constitution does not permit social scientists (Br. for Pet., Appendix E, pp. 3e-6e), law enforcement officers (pp. 7e-9e), or the undeterred prison inmate (pp. 9e-10e) who has committed murder to fashion the contours of the Eighth Amendment.

It is submitted that petitioner has failed to show that the death penalty serves no legitimate function in our society. As a consequence, the United States Constitution leaves the Congress and the legislatures of the various states, the elected representatives of the People, free to determine that the protection of society under present conditions requires death as a form of punishment for certain serious crimes.

F. Contemporary Society Recognizes Capital Punishment as a Permissible Form of Punishment in Its Arsenal to Combat Crime

Petitioner asserts that society has rejected capital punishment and that this "rejection" must be finalized by means of an Eighth Amendment interpretation by this Court.

However, petitioner is quick to admit that, "thirty jurisdictions have enacted death penalty legislation since *Furman*" (Br. for Pet., p. 131), adding that the legislation is narrower in all but two cases, than their pre-*Furman* authorizations of capital punishment. The response of the majority of states to accomplish the restoration of capital punishment is documented in Petitioner's Brief, Appendix A.

It is difficult to accept petitioner's argument on rejection when the elected representatives of the People in a majority of the states have so quickly responded to assure their constituents the protection of this sanction.

Petitioner also seems to argue that society has rejected capital punishment because, he asserts, prosecutors are not bound by rigid charging and plea acceptance rules, juries are not restricted in their findings on the facts, and governors and presidents are permitted to grant clemency; further, it appears that he contends that this punishment is only meted out to "racial minorities and to the poor."

Petitioner offers no proof of the validity of his legal assertions or of his factual claims and he is hard pressed in his attempt to make his "rejection by society" arguments appear realistic. Yet he asks this Court to accept his speculative arguments and to make a constitutional judgment based thereon!

Petitioner implies that it is only vengeful and misguided people, out of step with the "evolving standards of decency that mark the progress of a maturing society", who are in favor of the death penalty today. It is submitted that there are innumerable indicia of the public's continued general acceptance of the death penalty as a necessary form of punishment consistent with contemporary religious and moral standards of decency and the dignity of man.

While amicus wishes to emphasize that the meaning of the cruel and unusual punishment clause cannot expand and contract with the ebb and flow of something as fickle as public opinion as reflected in polls and surveys, nevertheless, since those who seek the abolition have relied on such indicators in support of their various contentions that the death penalty is out of favor with all but the police, prosecutors, and a few misguided others, amicus feels compelled to put this contention in the proper perspective.

Public sentiment has swung strongly in favor of the death penalty since this Court, citing a 1966 Gallop poll, characterized the United States as a nation less than half of whose people believed in the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 520. It is submitted that the recent polls demonstrate that public opinion has swung in favor of capital punishment. This has been illustrated not only in the Gallop polls that have been taken but also in the elections relating to retention or abolition of the death penalty.

Of course, the most recent large scale expression of public opinion, as far as California is concerned, occurred in 1972 when the death penalty initiative passed by an overwhelming majority, over 67% of the

voters voting in favor of the initiative (5,386,904 votes to restore the death penalty) and to enable the state to be restored to the constitutional balance in which the legislative branch was to make the determination as to whether capital punishment should be retained or abolished.

A similar referendum was held on December 15, 1970, when the voters of the State of Illinois, in conjunction with a vote on whether to ratify the new constitution adopted by their constitutional convention, were asked to ballot as to whether the death penalty should be abolished in that jurisdiction. The referendum results were comparable to the results later obtained in California, and serve as a good indication of the national sentiment, in view of the fact that Illinois is another large state having a substantial metropolitan and rural population. The referendum resulted in 64.3% vote against the abolition of capital punishment.

In addition, Congress has acted recently on this question. On July 17, and July 23, 1974, the House and Senate, respectively, adopted the conference report on the bill relating to aircraft hijacking which contained a death penalty provision. Cong. Quarterly, Weekly Report, No. 30, page 1983. The death penalty is now mandatory for airline hijackers who commit murder or cause a death indirectly (Public Law 93-366; U.S. News and World Report, page 30, January 20, 1975).

The popular sentiment in favor of the death penalty as a necessary form of punishment is reflected in the number of American jurisdictions that retained this penalty at the time that this Court spoke in *Furman*

v. Georgia, supra. At that time, the District of Columbia, the federal government, and forty of the fifty states retained capital punishment as a form of punishment for certain crimes. At the time *Furman* was decided, despite almost five years of the "moratorium", there were over 600 prisoners committed to prisons on judgments of death.

It is submitted that another accurate barometer of the "evolving standards" was the constant number of defendants whom juries annually sent to the nation's prison systems under sentence of death. U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1968). It would appear that juries are continuing to perform their function in maintaining a link between contemporary community values and the penal system. *Witherspoon v. Illinois, supra,* at 519 n.15.

The large majority of persons convinced of the need for capital punishment in America reflects a cross section of the nation's population. It is submitted that these persons, including retail clerks, grocery and liquor store operators, pharmacists, bank tellers, gas station attendants and others who, like police officers, have frequent occasion to look down the "business end" of a robber's pistol or shotgun, do not share this petitioner's sentiment that the death penalty is a barbaric relic of the past. In short, contrary to the impression that petitioner seeks to convey, there appears to be substantial support for the death penalty in almost all social, economic and occupational groups, and indeed, the preponderance of public opinion is in favor of retaining the death penalty as one of the forms of punishment available for serious offenses.

Petitioner apparently believes that this Court should respond to what he terms the "world-wide" trend toward ending the use of the death penalty. It is submitted that this is a frail foundation upon which to postulate the unconstitutionality of the death penalty in this country. It is ridiculous to say that the Framers of the Eighth Amendment had in mind in 1789 that what nations did throughout the world should impair the ability of the various states to provide adequate punishment for those who violate the laws of the state. Certainly the availability of the death penalty for the protection of society was not to be judged by what occurred in countries such as Lichtenstein, Luxembourg, Surinam or Mozambique.

It has been stated that the total number of nations which are abolitionist represent a minority in the world community and it is to be noted that the conditions that lead any one of the foreign jurisdictions to conclude that a particular punishment is or is not required for the protection of its population varies from nation to nation as conditions vary from state to state within our own federal republic. It is further to be noted that petitioner has not pointed to any abolitionist nation which has rejected the death penalty by judicial declaration or edict.

Patrick, "The Status of Capital Punishment: A World Perspective" (December 1965), 56 Jour. Crim. L. COPS 397, 411; Royal Commission on Capital Punishment, 1949-1953 Report 340.

Amicus understands that in England, which retains capital punishment for certain crimes as do many "abolition" nations, the House of Commons recently rejected a bill to restore capital punishment for certain

violent crimes (See Br. for Pet., p. 115 n.174). Amicus finds it reassuring that a nation, sharing a common heritage with the United States, still permits decisions as to the utility and availability of capital punishment to be determined by the elected representatives of the People!

Amicus submits that petitioner cannot sustain his claim that contemporary society rejects capital punishment. It is further evident that even if he could sustain this claim, he would state no case for the invalidation of the death penalty on a new interpretation of the Eighth Amendment by this Honorable Court.

Conclusion

In an era characterized by rising crime rates, mass killings, inmate homicides, revolutionary bombings of public buildings, and the assassination of public figures and law enforcement officers, it would be inappropriate for a legislature to contravene the intent of the Framers and the will of the People by abolishing capital punishment. How much less appropriate would it be for this Court, under the aegis of the Eighth Amendment, to decree that this form of punishment, expressly sanctioned by the words of the Constitution and a long line of decisions by this Court, is now forbidden to the People.

It is submitted that nothing has happened in the 185-year history of the Constitution which can alter the fact that the Framers contemplated the death penalty as a form of punishment of necessity available to the People and the states for the protection of society. Likewise, there has been no decision of this Court contravening the intent of the Framers and contem-

porary society has accepted this sanction as a proper weapon to combat crime.

Amicus respectfully submits that no case has been made by petitioner for this Court to take the unprecedented step of invalidating Congressional acts and state statutes providing for the death penalty on the ground that this punishment is now "cruel and unusual."

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,

WILLIAM E. JAMES,
Assistant Attorney General,

By WILLIAM E. JAMES,
Attorneys for Amicus Curiae State of California.

APPENDIX A

[Death Penalty]

SEC. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution. [New section adopted November 7, 1972. Initiative measure.]

APPENDIX B

CHAPTER 719

An Act to Amend Section 1018 of, to add Sections 190, 190.1, 190.2, 190.3, 209, 219, and 4500 to, and to Repeal Sections 190, 190.1, 209, 219, and 4500 of, the Penal Code, Relating to Punishment for Crimes.

[Approved by Governor September 24, 1973.
Filed with Secretary of State September 24, 1973.]

The people of the State of California do enact as follows:

SECTION 1. Section 190 of the Penal Code is repealed.

SEC. 2. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1. Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

SEC. 3. Section 190.1 of the Penal Code is repealed.

SEC. 4. Section 190.1 is added to the Penal Code, to read:

190.1. In any case in which the death penalty is to be imposed as the penalty for an offense only upon

the finding of the truth of the special circumstances enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of the defendant's counsel, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of his counsel. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue

of whether or not any of the special circumstances charged are true or not true.

If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant shall suffer the penalty of death, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury is unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all of such special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be retried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach a unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose the punishment of confinement in the state prison for life.

SEC. 5. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty of a person found guilty of first-degree murder shall be death in any case in which the

trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (1) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceedings.

(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery, in violation of Section 211.

(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.

(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

SEC. 6. Section 190.3 is added to the Penal Code, to read:

190.3 (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commis-

sion of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

SEC. 7. Section 209 of the Penal Code is repealed.

SEC. 8. Section 209 is added to the Penal Code, to read:

209. Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death in cases in which any person subjected to any such act suffers death, or shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers bodily harm, or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where no such person suffers death or bodily harm.

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under Section 209 as it read prior to September 22, 1951, shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.

SEC. 9. Section 219 of the Penal Code is repealed.

SEC. 10. Section 219 is added to the Penal Code, to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death in cases in which any person subjected to any such act suffers death as a proximate result thereof, or imprisonment in the state prison for life without the possibility of parole in cases where any person suffers bodily harm as a proximate result thereof, or imprisonment in the state prison for life, with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 11. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be put in by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty to a capital offense which does not require the further proceedings pro-

vided for in Section 190.1 shall be received from a defendant. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall find that the defendant understands his rights to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 12. Section 4500 of the Penal Code is repealed.

SEC. 13. Section 4500 is added to the Penal Code, to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another, other than another inmate, with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, or the person so assaulted is another inmate, the punishment

shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 14. Notwithstanding Section 2164.3 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because the duties, obligations or responsibilities imposed on local government by this act are minor in nature and will not cause any financial burden to local government.

SEC. 15. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provision or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

APPENDIX C

Statements of Arrestees Compiled by the Los Angeles Police Department's Study of the Deterrent Effect of the Death Penalty, February 1971

1. (unarmed robber) "Since in reality there is no death penalty in California, I would kill to obtain what I want."

2. (armed robber) "I used a pellet gun because I didn't want to kill anyone and be put to death in the gas chamber."

3. (unarmed burglar) "I don't carry a gun. I don't want to be shot at by police and am afraid of the death penalty."

4. (armed robber) "I used an unloaded gun in the robbery of a market so I would not hurt anyone and because I am afraid of the death penalty."

5. (armed robber) "The gun was unloaded because I didn't want to hurt anyone. I know the punishment would be greater if I shot anyone during a robbery."

6. (armed robber) "I would be afraid to use a gun because of possible death penalty."

7. (armed attempted murderer) "I would have shot it out if necessary, the death penalty is no deterrent."

8. (armed robber) "I used a blank revolver because I'm an ex-con."

9. (unarmed robber) "I would not use a gun, I am afraid of the consequences of the death penalty."

10. (unarmed burglar) "I never owned a gun because I'm afraid of the death penalty."

11. (unarmed burglar) "If I was armed I would not have used the weapon, I am afraid of the gas chamber."

12. (unarmed robber) "I didn't use a gun because I was afraid of being shot."

13. (armed suspect charged with assault with a deadly weapon) "I would kill if I had the chance, I'm not afraid of any courts. They are easy."

14. (unarmed attempted robber) "I am waiting for the death penalty to be removed, then everything is free."

15. (unarmed forceable rapist) "I don't carry a gun because I'm afraid of getting the death penalty."

16. (unarmed burglar) "Because of the death penalty, I would never arm myself."

17. (unarmed forceable rapist) "I have gotten into too much trouble before when I had a gun."

18. (armed suspect charged with assault with intent to commit murder) "Even if a death occurred as a result of a shooting, I am not afraid because no one believes in the death penalty anymore."

19. (unarmed robber) "I am afraid of the death penalty. I wasn't armed."

20. (unarmed robber) "I used a toy gun, I didn't want to hurt anyone."

21. (unarmed robber) "I don't carry a gun, I might shoot someone accidentally, I'm afraid of the death penalty."

22. (unarmed burglar) "I'm an ex-con, I would be an idiot to carry a gun. Punishment would be too great."

23. (armed robber) "I didn't want to hurt anyone, I had an empty gun."

24. (unarmed robber) "I would use weapon if I got into a bind. It doesn't make any difference, no one goes to the gas chamber."

25. (armed robber) "I would use gun if necessary, but I fear the death penalty."

APPENDIX D

Examples of Deterrent Effect of Threat of Death Penalty Taken From Records of the Los Angeles Police Department and Reported in People v. Love, 56 Cal. 2d 720, 735-37 [366 P.2d 33, 41-42] (McComb, J., dissenting).

(i) Margaret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: "Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*"

(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were killed in the commission of robberies, they could all receive the death penalty.*

(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Josephy Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961, for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, "*I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.*"

(iv) Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: "I think I might have escaped at the market if I had shot one or more of them. *I probably would have done it if it wasn't for the gas chamber.* I'll only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day."

(v) Orelius Mathew Stewart, an ex-convict, with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer, he stated: "The officer who arrested me was by himself, and if I had wanted, I could have blasted him. *I thought about it at the time, but I changed my mind when I thought of the gas chamber.*"

(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber.*

(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: "I want to ask you one question, do you think they will repeal the capital punishment law. *If they do, we can kill all you cops and judges without worrying about it.*"

(viii) Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him, and he could easily have shot and killed the arresting officer. By his own statements to interrogating officers, however, *he was deterred from this action because he preferred a possible life sentence to death in the gas chamber.*

(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, "*I know that if I had a real gun and killed someone, I would get the gas chamber.*"

(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery and

kidnapping committed on November 27, 1959. Using a screwdriver in his jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, "*I did not want to get the gas.*"

(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: "I know I'm going to the joint and probably for life. *If I had a real gun and killed someone, I would get the gas. I would rather have it this way.*"

(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty.*

(xiii) Theodore Roosevelt Cornell, with many aliases, and ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied, "*If I used a real gun and shot someone, I could lose my life.*"

(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware the penalty for killing a person in a robbery was death in the gas chamber.*